BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

GERALD R. CARR, Claimant, v. M.R. PRIEST, INC., dba ADVANCED SIGN & DESIGN AND TRAFFIC PRODUCTS & SERVICE, Employer, and FREMONT INDEMNITY COMPANY, Surety, and IDAHO INSURANCE GUARANTY ASSOCIATION, Party in Interest, Defendants.	**IC 01-019111** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** Filed January 31, 2006

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Robert D. Barclay, who conducted a hearing in Boise on June 23, 2005. Claimant, Gerald R. Carr, was present in person and represented by R. Daniel Bowen of Boise; Defendant Employer, M.R. Priest, Inc., dba Advanced Sign & Design and Traffic Products & Service and Defendant Fremont Indemnity Company (now defunct) and Idaho Insurance Guaranty Association, party in interest, were represented by Glenna M. Christensen of Boise. The parties

presented oral and documentary evidence. This matter was then continued for the taking of post-hearing depositions, the submission of briefs, and subsequently came under advisement on October 21, 2005. Referee Barclay retired from the Idaho Industrial Commission and the matter was reassigned to Referee Alan Taylor.

ISSUES

The issues presented for resolution at hearing were:

1. Whether Claimant is entitled to permanent partial or permanent total disability in excess of permanent impairment, and the extent thereof; and

2. Whether Claimant is entitled to an award of attorney fees pursuant to Idaho Code § 72-804.

In their post-hearing brief, Defendants conceded that Claimant is totally and permanently disabled, thus the sole issue remaining is Claimant's entitlement to attorney fees.

ARGUMENTS OF THE PARTIES

Claimant argues that Defendants' denial of his claim for total permanent disability until after hearing was unreasonable. Defendants contend that their denial through the time of hearing was reasonable up until Dr. King advised all parties at his post-hearing deposition that x-rays of Claimant's back taken that very day revealed that two surgically-placed rods stabilizing Claimant's spine had broken. Defendants assert that until that time, Dr. King and Dr. Cox opined Claimant might be capable of sedentary employment. Defendants further assert that until that time they reasonably relied upon their vocational expert, Steve Hamman, who believed Dr. King had prescribed a LifeFit program to attempt to increase Claimant's functionality thus enhancing Claimant's employability in part-time sedentary work.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant, Claimant's spouse Carole Carr, and Cindy Hendrickson taken at the June 23, 2005, hearing;

2. Joint Exhibits 1 through 16 admitted at the hearing;

3. The deposition of Thomas Rambow, PA-C, taken by Claimant on June 23, 2005;

4. The deposition of Robert Reidelberger, taken by Claimant on June 30, 2005;

5. The deposition of Howard King, M.D., taken by Claimant on June 30, 2005; and

6. The deposition of Steven R. Hamman, taken by Defendants on July 15, 2005.

Defendants' objection at page 16 of Thomas Rambow's Deposition is sustained. After having fully considered all of the above evidence, and the arguments of the parties, the Referee submits the following findings of fact and conclusions of law for review by the Commission.

FINDINGS OF FACT

1. Claimant was 53 years old at the time of hearing. He was born in Galena, Missouri and raised in Meridian, Idaho. During high school he worked on the family farm and also hung sheet rock. He graduated from high school and attended Boise State University for one year prior to being drafted into the U.S. Army in approximately 1971. Claimant was assigned to air defense artillery in the Army and drove trucks carrying missiles. Upon his honorable discharge, Claimant worked for several months at a machine shop and gravel pit where he loaded trucks and leveled fill with a front-end loader and backhoe. He then worked for approximately four years for a construction company pouring concrete, building fences, and installing signs. He next returned to the machine shop and gravel pit where he mainly operated and repaired heavy equipment until

approximately 1984. At that time Claimant started his own business performing concrete and excavation work, which included lifting up to 100 pounds. In the late 1980's Claimant commenced working for Employer M.R. Priest, Inc., in various businesses. Claimant helped run crews in construction control, setting up road construction drums and cones, weighting the drums with 50 to 80 pound sandbags, and installing freeway signs, guardrail posts, and reflector delineators. Setting various posts often required use of a 65 pound jackhammer, 70 pound power driver, and digging bars.

2. Claimant first injured his low back in the mid-1980's when he slipped on a loose rock while carrying a bucket of concrete in his hands and wrenched his back. He received chiropractic treatment and returned to work shortly thereafter. In 1988, Claimant ruptured a cervical disk and was surgically treated by Patrick Cindrich, M.D. He recovered and returned to work. A few years thereafter he ruptured a second cervical disk and was again surgically treated by Dr. Cindrich. During the course of Claimant's recovery from his second cervical surgery, he ruptured a third cervical disk during physical therapy. Dr. Cindrich recommended conservative measures and Claimant's condition improved without further cervical surgery. He noticed some decrease in cervical range of motion, however he returned to work with no significant limitations.

3. In early 2000, Claimant began noting that his skin bruised easily and seemed fragile. He attributed this to prolonged sun exposure and sought no definitive diagnosis.

4. On September 25, 2000, Claimant was working for Employer setting seven-foot tall delineator posts with a post driver on a slope when the gravel gave way and Claimant twisted and fell to the ground with the driver and post. He felt like the twisting fall "ripped [his] back in two." Transcript, p. 41, Ll. 19-20.

5. Claimant received conservative medical care from his niece, Julie Lyon, M.D., who referred him to neurologist Richard Wilson, M.D., when his condition did not improve. The Surety reviewed and accepted Claimant's claim for benefits. Dr. Wilson treated Claimant with medications, therapy and further diagnostic testing. Claimant's back pain continued and he developed constant right lower extremity pain. He returned to light duty work for several months but eventually was unable to continue his assigned light duty tasks.

6. Commencing March 14, 2001, Claimant began receiving pain control treatment from Richard A. DuBose, M.D., and Thomas Rambow, PA-C.

7. On June 2, 2001, Claimant was examined by Paul J. Montalbano, M.D., who recommended a multi-level fusion. On June 14, 2001, Claimant was examined by Timothy Doerr, M.D., who also recommended a multi-level fusion.

8. On June 21, 2001, Claimant was examined by Howard King, M.D., who noted a marked degenerative scoliosis with a thoracic curve from T7 to L3 measuring 34 degrees, and a right lumbar curve measuring 28 degrees. Dr. King concluded that Claimant's industrial accident aggravated and rendered symptomatic his degenerative spine disease.

9. On July 30, 2001, Dr. King performed a decompressive laminectomy at L3-4 and L4-5. Claimant participated in physical therapy to aid his recovery. His condition improved somewhat, but subsequently worsened again.

10. In September 2001, Industrial Commission Rehabilitation Consultant Robert Reidelberger began assisting Claimant in preparation for returning to employment. In response to a job site evaluation describing Claimant's time of injury work, Dr. King noted that Claimant could not return to his pre-injury position, light duty, or alternate duty.

11. Claimant continued to experience increasingly fragile skin and also muscular weakness and unexplained weight gain. He was ultimately diagnosed with Cushing's Disease. On November 29, 2001, Stanley Barnwell, M.D., performed transsphenoidal resection of Claimant's pituitary tumor. The tumor's infiltrating nature was consistent with aggressive pituitary adenoma, thus on May 3, 2002, Claimant underwent stereotactic radiation to the pituitary gland.

12. Claimant's overall condition improved, however his back and lower extremity pain worsened and Dr. King recommended further surgical intervention including a multiple level fusion of the lumbar and thoracic spine with instrumentation. Claimant understood that without significant surgical intervention he risked increasing spinal deformity and possible eventual paralysis.

13. By letter dated December 5, 2002, David A. Hanscom, M.D., of the Sun Valley Spine Institute, who performed an independent medical examination, noted Claimant suffered significant scoliosis convex to the right encompassing L2 to L5 with a 42 degree curve and loss of lumbar lordosis. Dr. Hanscom recommended surgical intervention with placement of lordosing type cages at L2-3, 3-4, 4-5, and 5-S1. He further recommended fusion from T9 or T10 to the pelvis. He acknowledged that fusion from T4 to the pelvis might also be considered. Also on December 5, 2002, David B. Verst, M.D., of the Sun Valley Spine Institute, opined that multilevel fusion was warranted.

14. On December 20, 2002, Dr. King performed anterior fusion of T12 to the sacrum, followed by posterior fusion of T3 to the sacrum and pelvis with multisegmental instrumentation from T3 to the pelvis resulting in a 14 level fusion of Claimant's lumbar and thoracic spine. The fusion helped reduce Claimant's pain to some extent, but did not substantially improve his functionality.

15. Cindy Hendrickson adjusted the claim for Defendants from the time of Claimant's injury through his December 2002 surgery. She later left employment with the Surety. Prior to her departure, Hendrickson advised her supervisors that Claimant "had a high probability of being a perm and total." Transcript, p. 125, Ll. 5-6. In Hendrickson's 22 years of workers' compensation claims adjusting, she had never seen an individual with restrictions similar to Claimant's restrictions, who was able to return to the workplace. Hendrickson hired vocational consultant Bill Jordan to assist in Claimant's return to work. Jordan encouraged Claimant to acquire computer skills but did not identify any employment prospects for Claimant. However, Claimant was then in no position to seriously pursue any employment as he was still recuperating from 14 level fusion surgery.

16. In approximately July 2003, the Surety, Fremont Indemnity Company, went into liquidation. After that time, claim activity was handled by the Idaho Insurance Guaranty Association eventually through personnel of the Western Guaranty Fund Services from offices located in Denver, Colorado.

17. Claimant participated extensively in various physical therapy modalities to aid his recovery post-surgery. On March 3, 2004, Dr. King prescribed a conditioning and aerobic strengthening program to continue throughout Claimant's lifetime.

18. On May 18, 2004, Dr. King responded to an adjustor for Defendants, regarding Claimant's status. Dr. King noted:

> Mr. Carr probably would be able to consider some vocational rehabilitation. He will not be able to resume his previous employment doing heavy construction. Gerald would need a part-time job where he would have the ability to do minimal, if any lifting and the opportunity to change position frequently including sitting, standing and even laying down as needed. I am honestly not optimistic that Mr. Carr will be able to resume any type of work on a reasonably continuous basis.

Joint Exhibit 2, p. 00005. Dr. King considered these limitations permanent and later also

permanently restricted Claimant to lifting no more than ten pounds.

19. Claimant subsequently resumed working with Industrial Commission Rehabilitation Consultant Robert Reidelberger to develop employment opportunities, but without success.

20. On June 2, 2004, Dr. King again responded to an inquiry from the Surety's case manager and stated: "As I have noted in the past, Mr. Carr may be able to start some vocational rehabilitation, but it will be on a limited basis. Again, I am not overly optimistic that we will get him back to a continuous employment." Joint Exhibit 2, p. 00006.

21. During the summer of 2004, Claimant's Cushing's Disease symptoms began to reappear. He noted depression, unexplained weight gain, and skin problems.

22. On July 14, 2004, Claimant was evaluated at Defendants' request by Rodde D. Cox, M.D, who rated Claimant's impairment at 58% of the whole person, with 16% attributable to Claimant's underlying degenerative changes, including degenerative scoliosis, and the remaining 42% attributable to Claimant's industrial accident and resulting treatment. Dr. Cox opined that Claimant would be capable of only very sedentary work with no lifting greater than 10 pounds and with position changes as needed. He further opined that Claimant would likely only be able to work on a part-time basis.

23. Commencing approximately July 2004, Claimant's worker's compensation claim was handled on behalf of the Surety by Michelle Montoya, an adjustor for the Western Guaranty Fund from its Denver offices. Claimant requested authorization for membership at a health club one block from his home instead of having to travel across town to attend a fitness maintenance program at the Elks Rehabilitation Hospital. Montoya instructed Claimant to obtain a statement from Dr. King regarding the medical necessity of the request. Claimant obtained the statement from Dr. King and

forwarded it to Montoya who then denied the request.

24. Claimant's workers' compensation claim file was subsequently transferred to adjustor Amy Funderberg, also in the Denver office of the Western Guaranty Fund. Claimant renewed his request for authorization for membership at a health club near his home and also requested that the Surety correct the rate of temporary total disability benefits it was paying pursuant to Idaho statute. After approximately one month, Funderberg made the correction in Claimant's TTD rate and also approved his health club membership request.

25. In approximately November 2004, Claimant's counsel wrote the Surety, inviting the Surety to acknowledge that Claimant was totally and permanently disabled. In response, the Surety's adjustor notified Claimant in December 2004 that the Surety was converting Claimant's benefits from temporary total disability benefits to permanent partial disability benefits based upon Dr. Cox's July 2004 IME. The Surety also claimed an overpayment of temporary total disability benefits for the period from July until December 2004 and advised Claimant it would deduct the alleged overpayment from the front-end of Claimant's impairment rating benefits until the Surety had recouped the alleged overpayment. Claimant was again forced to respond by correspondence from counsel to persuade the Surety to pay impairment benefits without front-end deduction.

26. On December 9, 2004, Defendants retained Steven R. Hamman to perform a vocational evaluation of Claimant. Hamman believed Claimant's participation in a functional capacity evaluation in connection with the LifeFit Program offered at the Elks Rehabilitation Hospital in Boise would enhance Claimant's employability. Dr. King did not recommend, and Claimant did not participate, in the LifeFit Program. Claimant had already been involved in physical therapy at the Elks to the extent he was capable for approximately one and one-half years, had been

found medically stable, and had been rated by Dr. Cox at the Surety's direction. Apparently Hamman was not advised of Claimant's prior extensive participation in physical therapy. Hamman's analysis did not uncover any substantial skills Claimant possessed that would be marketable in other positions.

27. Given the Surety's prior conduct, Claimant concluded that litigation would be necessary to convince the Surety of his total permanent disability. Claimant entered into a contingency contract with counsel. On January 4, 2005, Claimant's counsel filed the Complaint in the present action.

28. In February 2005, Claimant had surgery to remove his adrenal glands to control a renewed onset of Cushing's Disease.

29. In a letter to Claimant's counsel dated February 3, 2005, Thomas Rambow, PA-C, opined that Claimant was physically unable to perform any employment stating:

> In response to Mr. Gerald Carr's disability case, I have been treating him for approximately five years. He does suffer from pain and chronic debility related to post laminectomy syndrome of the thoracic and lumbar spine. We have aggressively treated him for his pain and although we are giving him some quality-of-life, I do not believe that we will ever be able to get him to the point that he could return to work. I do believe that he is totally and permanently disabled in the sense that he is physically unable to perform any gainful employment. I do concur with Dr. King's physical restrictions in that he could work no more than four hours per day; that he is limited to sedentary employment; that he is limited to lifting no more than 10 pounds on an occasional basis; and that he must be able to sit, stand, or lay down as is needed.

Joint Exhibit 3, p. 00030.

30. On February 10, 2005, Robert Reidelberger's notes were sent to the Surety, including Reidelberger's review of the work restrictions imposed by Dr. King and Dr. Cox, with the conclusion that: "It is my belief it will be very difficult to find part-time work in a very sedentary nature for the claimant in his chosen areas of woodworking and crafts as this is what he feels most

comfortable doing." Joint Exhibit 15, p. 00181. Reidelberger spoke to Claimant's counsel about Claimant's employability on February 15, 2005 and recorded in his notes: "I am again at a loss to provide options and opportunities for the claimant. … Again, job opportunities will be very difficult for the claimant based upon the physician's restrictions." Joint Exhibit 15, p. 00182.

31. On February 18, 2005 Defendants filed their Answer denying Claimant's assertion of total permanent disability.

32. At hearing on June 23, 2005, Claimant testified that, as recommended by Dr. King, he walks, rides a stationary bicycle, and performs back exercises. He uses assistive devices to put on his pants and socks each morning because he cannot bend to reach them. Claimant can be up for approximately one hour before increasing back pain forces him to lie down.

33. Claimant's wife, Carole Carr, testified at hearing that in her experience she has never seen an individual with Claimant's restrictions return to the workplace. Ms. Carr has been a claims adjuster for workers' compensation matters for 30 years, including 26 years as an adjuster of more serious time loss claims and has worked for Argonaut Insurance, Industrial Indemnity, EBI Insurance, TransAmerica/TIG Insurance, CC Claimant's Adjusting, and Pinnacle Insurance.

34. Also on June 23, 2005, Thomas Rambow, PA-C, testified during his post-hearing deposition, that Claimant "was totally and permanently disabled in the sense that he was physically unable to perform any gainful employment." Rambow Deposition, p. 26, Ll. 4-6. Rambow testified that Claimant has one of the worst backs he has ever seen, that Rambow is only aware of one other individual in the approximately 4,000 pain patients he has treated over the last five years that has a similar number of levels fused.

35. On June 30, 2005, x-rays of Claimant's spine revealed that two of the titanium rods

surgically placed in Claimant's spine had broken at the T-12 / L-1 level. While identifying the broken rods, Dr. King testified in his post-hearing deposition that he placed no additional restrictions on Claimant, but rather continued with the restrictions already provided. Dr. King testified that Claimant's weak spot at T-12 / L-1 may spontaneously heal, may never heal yet still remain relatively stable and asymptomatic, or may become increasingly symptomatic thus requiring surgical repair of the instrumentation. In any case, Dr. King did not expect Claimant to improve significantly.

36. On July 15, 2005, Defendants' vocational rehabilitation expert, Steve Hamman, testified in his post-hearing deposition that without a functional capacity evaluation he was unable to identify any jobs that Claimant might be able to pursue. Hamman Deposition, p. 16. Hamman emphasized that Claimant's need to lay down greatly curtailed his job training and employment potential. The need to lay down as needed had been documented in Dr. King's restrictions since June 2004.

37. In their post-hearing brief filed October 20, 2005, Defendants conceded for the first time that Claimant was totally and permanently disabled.

DISCUSSION AND FURTHER FINDINGS

38. The provisions of the Workers' Compensation Law are to be liberally construed in favor of the employee. Haldiman v. American Fine Foods, 117 Idaho 955, 793 P.2d 187 (1990). The humane purposes which it serves leave no room for narrow, technical construction. Ogden v. Thompson, 128 Idaho 87, 910 P.2d 759 (1996).

39. **Attorney Fees.** None of the Defendants have asserted that Idaho Code § 72-804 should not control the present case. Idaho Code § 72-804 provides:

> *Attorney's fees - Punitive costs in certain cases.* - If the commission or any court before whom any proceedings are brought under this law determines that the employer or his surety contested a claim for compensation made by an injured employee or dependent of a deceased employee without reasonable ground, or that an employer or his surety neglected or refused within a reasonable time after receipt of a written claim for compensation to pay to the injured employee or his dependents the compensation provided by law, or without reasonable grounds discontinued payment of compensation as provided by law justly due and owing to the employee or his dependents, the employer shall pay reasonable attorney fees in addition to the compensation provided by this law. In all such cases the fees of attorneys employed by injured employees or their dependents shall be fixed by the commission.

40. Attorney's fees are not granted to a claimant as matter of right under the Idaho Workers' Compensation Law, but may be recovered only under the circumstances set forth in Idaho Code § 72-804. The decision that grounds exist for awarding a claimant attorney's fees is a factual determination which rests with the commission. Troutner v. Traffic Control Company, 97 Idaho 525, 528, 547 P.2d 1130, 1133 (1976). An award of attorney's fees in a worker's compensation case must be deemed compensation to the injured employee and not as a penalty against the employer or surety. Dennis v. School District No. 91, 135 Idaho 94, 98, 15 P.3d 329, 333 (2000).

41. Claimant seeks attorney's fees for Defendants' refusal to acknowledge he was totally and permanently disabled prior to the June 23, 2005 hearing. Defendants did not concede Claimant was permanently and totally disabled until October 20, 2005, well after hearing and the completion of all post-hearing depositions, when Defendants filed their post-hearing brief. Defendants assert their concession of Claimant's total permanent disability was prompted by Dr. King's post-hearing deposition when he advised that titanium rods in Claimant's back had broken. Surely Defendants' concession at that point was not unreasonable. However, Claimant asserts that his total permanent disability had been clearly established prior to hearing and that Defendants denied his claim and forced him to prove through the expense of a hearing and post-hearing depositions an assertion

which Defendants had no evidence to refute.

42. Analysis of the reasonableness of Defendants' conduct must begin with an examination of the burden of proof required to establish a prima facie case of total permanent disability.

43. A claimant can demonstrate total permanent disability either by proving his or her medical impairment together with the pertinent nonmedical factors totals 100%, or by proving he or she fits within the definition of an odd-lot worker. Boley v. State, Industrial Special Indemnity Fund, 130 Idaho 278, 281, 939 P.2d 854, 857 (1997). An odd-lot worker is one "so injured that he [or she] can perform no services other than those which are so limited in quality, dependability or quantity that a reasonably stable market for them does not exist." Bybee v. State, Industrial Special Indemnity Fund, 129 Idaho 76, 81, 921 P.2d 1200, 1205 (1996).

44. A claimant may satisfy his or her burden of proof and establish total permanent disability under the odd-lot doctrine in any one of three ways:

1. By showing that he or she has attempted other types of employment without success;
2. By showing that he or she or vocational counselors or employment agencies on his or her behalf have searched for other work and other work is not available; or
3. By showing that any efforts to find suitable work would be futile.

Lethrud v. Industrial Special Indemnity Fund, 126 Idaho 560, 563, 887 P.2d 1067, 1070 (1995).

45. Once a claimant satisfies the Lethrud test, the burden shifts to defendants to prove that there is suitable work available which the claimant could perform:

> If the evidence of the medical and nonmedical factors places a claimant prima facie in the odd-lot category the burden is then on the employer, the Fund in this case, to show that some kind of suitable work is regularly and continuously available to the claimant.
> …
> In meeting its burden, it will not be sufficient for the Fund to merely show that appellant is able to perform some type of work. Idaho Code § 72-425 requires that the Commission consider the economic and social environment in which the claimant lives. To be consistent with this requirement it is necessary that the Fund introduce evidence that there is an actual job within a reasonable distance from appellant's home which he is able to perform or for which he can be trained. In addition, the Fund must show that appellant has a reasonable opportunity to be employed at that job. It is of no significance that there is a job appellant is capable of performing if he would in fact not be considered for the job due to his injuries, lack of education, lack of training, or other reasons.

Lyons v. Industrial Special Indemnity Fund, 98 Idaho 403, 406-7, 565 P.2d 1360, 1363-4 (1977).

46. In the present case, before February 18, 2005 when Defendants filed their Answer denying Claimant's assertion of total permanent disability, Defendants had received, or had readily available to them, several critical indications of the severity of Claimant's condition.

47. Since December 2002, Defendants knew that Claimant had a 14 level spinal fusion with instrumentation extending from T3 to his pelvis. Since May 18, 2004, Defendants knew of the permanent restrictions imposed by Dr. King including: "part-time job … [with] minimal, if any lifting and the opportunity to change position frequently including sitting, standing and even laying down as needed." Joint Exhibit 2, p. 00005.

48. Since approximately July 14, 2004, Defendants have had the report of Dr. Cox opining that Claimant would be capable of only very sedentary work—likely only part-time work—with no lifting greater than 10 pounds and with position changes as needed.

49. Defendants also had available the February 3, 2005 letter from Thomas Rambow, PA-C, who after approximately four years of working with Claimant's back condition opined: "I do not believe that we will ever be able to get him to the point that he could return to work. I do believe

that he is totally and permanently disabled in the sense that he is physically unable to perform any gainful employment." Joint Exhibit 3, p. 00030.

50. Lastly, from approximately February 10, 2005, Defendants had vocational expert Robert Reidelberger's review of Dr. King's and Dr. Cox's work restrictions and Reidelberger's conclusion that: "It is my belief it will be very difficult to find part-time work in a very sedentary nature for the claimant in his chosen areas of woodworking and crafts as this is what he feels most comfortable doing." Joint Exhibit 15, p. 00181. Defendants also had readily available to them Reidelberger's February 15, 2005 note that he was "again at a loss to provide options and opportunities for the claimant. … Again, job opportunities will be very difficult for the claimant based upon the physician's restrictions." Joint Exhibit 15, p. 00182.

51. This information was sufficient to establish a prima facie case of total permanent disability under the odd-lot doctrine. Claimant had produced ample evidence well in advance of hearing—much of it in advance of Defendants' Answer—that he satisfied the prima facie requirements of an odd-lot worker under the Lethrud test. Defendants thus knew or reasonably should have known that the burden of proof would shift to them pursuant to Lyons to identify an actual job which Claimant could perform and which Claimant had a reasonable opportunity to obtain.

52. Defendants do not assert, and the record does not establish, that Defendants had identified an actual job Claimant could perform given his permanent medical restrictions as they were imposed in July 2004 and as they existed through the date of hearing and prior to the discovery that two rods in Claimant's back had broken. Had they done so, Defendants' course of conduct would have been justified and reasonable. Instead, Defendants had not identified a viable position

for Claimant when they answered Claimant's Complaint and denied his total and permanent disability, nor when they responded to Claimant's Request for Calendaring, nor at the time of hearing, nor during post-hearing depositions, nor at any time.

53. Defendants cite Dr. King's comments in May and June 2004 that Claimant "probably would be able to consider some vocational rehabilitation" as justification for their expectation that Claimant was employable. However, Dr. King's correspondence also included his declarations that: "I am honestly not optimistic that Mr. Carr will be able to resume any type of work on a reasonably continuous basis." Joint Exhibit 2, p. 00005 (emphasis supplied). Dr. King had reiterated: "As I have noted in the past, Mr. Carr may be able to start some vocational rehabilitation, but it will be on a limited basis. Again, I am not overly optimistic that we will get him back to a continuous employment." Joint Exhibit 2, p. 00006 (emphasis supplied). A fair reading of Dr. King's comments portends the opposite of Defendants' expectation.

54. Defendants also assert their conduct was reasonable in that they relied upon the opinion of their vocational expert Steve Hamman who believed Claimant may be employable after completing the LifeFit Program. However, Defendants apparently did not advise Hamman that Claimant had already undergone extensive physical therapy at the Elks prior to receiving Dr. King's restrictions and prior to his rating and restrictions by Dr. Cox. Claimant had in effect already participated to the extent he was able in therapy designed to increase his functionality. Moreover, Hamman ultimately was unable to identify any actual suitable employment.

55. Surely Defendants are not expected to prove their case before Claimant puts on his evidence. However, having presented no proof at any time of an actual job within the physical restrictions imposed upon Claimant since June and July 2004, Defendants have failed to demonstrate

reasonable grounds to contest Claimant's assertions of total permanent disability.

56. The Referee concludes Claimant is entitled to attorney's fees as provided for by Idaho Code § 72-804 for Defendants' unreasonable denial of Claimant's claim for total permanent disability benefits.

CONCLUSIONS OF LAW

1. Claimant has proven that Defendants unreasonably denied his claim for total permanent disability benefits.

2. Claimant is entitled to attorney's fees from Defendants pursuant to Idaho Code § 72-804.

RECOMMENDATION

The Referee recommends that the Commission adopt the foregoing Findings of Fact and Conclusions of Law as its own, and issue an appropriate final order.

DATED this _20th_ day of January, 2006.

INDUSTRIAL COMMISSION

/s/_____
Alan Reed Taylor, Referee

ATTEST:

/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the _31st__ day of January 2006, a true and correct copy of **Findings of Fact, Conclusions of Law, and Recommendation** was served by regular United States Mail upon each of the following:

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kkr /s/_____